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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 LLOYD LEPOCHAT,) 3:06-CV-00300-HDM (RAM)
9 Plaintiff,)
10 vs.)
11 JO ANNE B. BARNHART)
12 Commissioner of Social Security)
13 Defendant.)

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15 **REPORT AND RECOMMENDATION**
16 **OF U.S. MAGISTRATE JUDGE**

17 This Report and Recommendation is made to the Honorable Howard D. McKibben,
18 Senior United States District Judge. The action was referred to the undersigned Magistrate
19 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

20 Plaintiff filed a motion for reversal of the Commissioner's decision on January 11, 2007
21 (Doc. #8). Defendant opposed the motion and filed a cross-motion to affirm the
22 Commissioner's final decision on February 8, 2007 (Doc. #9).

23 **I. FACTUAL AND PROCEDURAL BACKGROUND**

24 At the time of the decision, Plaintiff Lloyd LePochat was a forty-five year old man with
25 a highschool education and a work history as a tattoo artist and construction painter (Tr. 19).
26 Plaintiff filed an application for Supplemental Security Income (SSI) and Disability Insurance
27 Benefits (DIB) on November 3, 2003 (Tr. 22, 53) asserting severe neck pain, back pain and
28 right shoulder injury have caused him to be permanently and completely disabled since
October 19, 1999 (Tr. 19-20).

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1 Plaintiff, represented by attorney Dennis A. Cameron, appeared and testified at the
 2 disability hearing on June 23, 2005 (Tr. 19). The Administrative Law Judge (ALJ) followed
 3 the five-stage procedure for evaluating disability claims, set forth in C.F.R. § 404.1520, and
 4 found, at step four, that Plaintiff could perform his past relevant work as a tattoo artist (Tr.
 5 22). Accordingly, in the decision issued on August 12, 2005, the ALJ found Plaintiff “not
 6 disabled” as defined in the Social Security Act (Tr. 22). Plaintiff appealed the decision and
 7 the Appeals Council denied review (Tr. 5-7). Thus, the ALJ’s decision became the final
 8 decision of the Commissioner (*Id.*).

9 Plaintiff now appeals the ALJ’s decision to the district court, in which he argues the
 10 ALJ improperly rejected Plaintiff’s credibility and, in doing so, used an incomplete RFC to
 11 determine Plaintiff could return to his past relevant work as a tattoo artist (Doc. #8).

12 Both parties stipulate that the ALJ fairly and accurately summarized the material
 13 evidence and testimony (Doc. #8 at 2, Doc. #9 at 2).

14 **II. STANDARD OF REVIEW**

15 The court must affirm the ALJ’s determination if it is based on proper legal standards
 16 and the findings are supported by substantial evidence in the record. *Smolen v. Charter*, 80
 17 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is “more than a mere scintilla. It means
 18 such relevant evidence as a reasonable mind might accept as adequate to support a
 19 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison*
 20 Co. v. *NLRB*, 305 U.S. 197, 229 (1938)). To determine whether substantial evidence exists,
 21 the court must look at the record as a whole, considering both evidence that supports and
 22 undermines the ALJ’s decision. *Orteza v. Shalala*, 50 F. 3d 748, 749 (9th Cir. 1995).
 23 “However, if evidence is susceptible of more than one rational interpretation, the decision of
 24 the ALJ must be upheld.” *Id.* The ALJ alone is responsible for determining credibility, and
 25 for resolving ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

26 The initial burden of proof rests upon the claimant to establish disability. *Howard v.*
 27 *Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986); 20 C.F.R. § 404.1512(a). To meet this burden,

1 a plaintiff must demonstrate an “inability to engage in any substantial gainful activity by
 2 reason of any medically determinable physical or mental impairment which can be expected
 3 ... to last for a continuous period of not less than 12 months ...” 42 U.S.C. §423 (d)(1)(A).

4 **III. DISCUSSION**

5 The Commissioner has established a five-step sequential process for determining
 6 whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987); *see* 20 C.F.R.
 7 §§ 404.1520, 416.920. If at any step the SSA can make a finding of disability or nondisability,
 8 a determination will be made and the SSA will not further review the claim. *Barnhart v.*
 9 *Thomas*, 540 U.S. 20, 24 (2003); *see* 20 C.F.R. §§404.1520(a)(4), 416.920(a)(4).

10 In the first step, it must be determined whether the claimant is engaged in
 11 “substantially gainful activity”; if so, a finding of nondisability is made and the claim is
 12 denied. *Yuckert*, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b). If the claimant is not
 13 engaged in substantially gainful activity, the second step requires determining whether his
 14 impairments or combinations of impairments are “severe.” *Yuckert*, 482 U.S. at 140-41. If
 15 a claimant’s impairments are so slight that they cause no more than minimal functional
 16 limitations, it will be determined that the claimant is not disabled. 20 C.F.R. § 404.1520. If,
 17 however, it is found that the claimant’s impairments are severe, such impairments will be
 18 presumed to be sufficiently severe provided the impairments meet or equal the impairments
 19 described in the Commissioner’s Listing of Impairments and are of sufficient duration. 20
 20 C.F.R. § 404.1520(d). If the claimant’s impairments meet or equal a listed impairment, the
 21 claimant is conclusively presumed disabled. *Id.* If the claimant’s impairments are severe, but
 22 do not meet or equal a listed impairment, the Commissioner proceeds to step four. *Yuckert*,
 23 482 U.S. at 141. In step four, the Commissioner determines whether the claimant can still
 24 perform “past relevant work.” 20 C.F.R. §§ 404.1520(e), 416.920(e). If he can still do past
 25 relevant work, then the ALJ should determine that he is not disabled. 20 C.F.R. §
 26 404.1520(f). If, however, he cannot perform past relevant work, the burden shifts to the
 27 Commissioner, *Yuckert*, 482 U.S. at 144, to establish, in step five, that the claimant can

1 perform work available in the national economy. *Id.* at 141-42; *see* 20 C.F.R. §§ 404.1520(e),
 2 404.1520(f), 416.920(e), 416.920(f).

3 Application of steps four and five requires the ALJ review the claimant's residual
 4 functional capacity and the physical and mental demands of the work he did in the past. 20
 5 C.F.R. § 404.1520(f) & (g). "Residual functional capacity" (RFC) is what the claimant can still
 6 do despite his limitations. 20 C.F.R. § 404.1545. If the individual cannot do the work he did
 7 in the past, the ALJ must consider his RFC, age, education, and past work experience to
 8 determine whether he can do other work. *Id.* If the Commissioner establishes the claimant
 9 can do other work which exists in the national economy, then he is not disabled. 20 C.F.R.
 10 404.1566.

11 In the present case, the ALJ applied the five-step sequential evaluation process and
 12 found, at steps one through three, that Plaintiff was not engaged in substantially gainful
 13 activity (Tr. 19) and that the medical evidence established Plaintiff has severe neck and back
 14 pain and left shoulder soft tissue injury (Tr. 21). However, the ALJ concluded these
 15 impairments do not meet or equal the level of severity of any impairments described in the
 16 Listing of Impairments (Appendix I, Subpart P, Regulation No. 4) either individually or in
 17 combination (Tr. 21). At step four, the ALJ determined Plaintiff could perform his past
 18 relevant work as a tattoo artist; therefore, review of Plaintiff's claim ended there (Tr. 22).

19 **Credibility Assessment**

20 Plaintiff asserts the ALJ erred in determining Plaintiff's subjective fatigue allegations
 21 were out of proportion with the overall weight of the objective evidence and other non-
 22 medical factors (Doc. #8 at 6). Specifically, Plaintiff contends the ALJ improperly discredited
 23 Plaintiff's testimony that he must lie down twice a day for two hours at a time and, based on
 24 this error, the ALJ failed to consider the effects of Plaintiff's fatigue when he determined
 25 Plaintiff's RFC and determined Plaintiff could perform his past relevant work as a tattoo artist
 26 (Doc. #8 at 6-7). Defendant argues the ALJ assessed Plaintiff's credibility and found
 27 Plaintiff's statements uncorroborated by the medical records, inconsistent with the

1 consultative examiner's opinion and unsupported by the conservative treatment Plaintiff
 2 received (Doc. #9 at 7).

3 A claimant's credibility becomes important at the stage where the ALJ assesses the
 4 claimant's RFC. *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001). Subjective
 5 symptom testimony may tell of greater limitations than medical evidence alone. *Id.* Thus, a
 6 claimant's credibility is often crucial to a finding of disability. *Id.* (citing Social Security Rule
 7 96-7p (1996)).

8 In general, when deciding whether to accept or reject a claimant's subjective symptom
 9 testimony, an ALJ must perform two stages of analysis: an analysis under *Cotton v. Bowen*,
 10 799 F.2d 1403 (9th Cir. 1986) (the "Cotton test") and an analysis of the credibility of the
 11 claimant's testimony regarding the severity of his or her symptoms. *Smolen*, 80 F.3d at 1281;
 12 *see also* 20 C.F.R. § 404.1529 (adopting two-part test). "If the claimant produces evidence
 13 to meet the *Cotton* test and there is no evidence of malingering, the ALJ can reject the
 14 claimants testimony about the severity of his or her symptoms only by offering specific, clear,
 15 and convincing reasons for doing so." *Smolen*, 80 F.3d at 1281.

16 Under the *Cotton* test, a claimant who alleges disability based on subjective symptoms
 17 "must produce objective evidence of an underlying impairment 'which could reasonably be
 18 expected to produce the pain or other symptoms alleged.'" *Bunnell v. Sullivan*, 947 F.2d 341,
 19 344 (9th Cir. 1991)(en banc). This test "imposes only two requirements on the claimant: (1)
 20 [he or] she must produce objective medical evidence of an impairment or impairments; and
 21 (2) [he or] she must show that the impairment or combination of impairments *could*
 22 *reasonably be expected to* (not that it did in fact) produce some degree of symptom." *Smolen*,
 23 80 F.3d at 1282 (emphasis in original); *see also* 20 C.F.R. § 404.1529(a)-(b).

24 An ALJ's credibility findings are entitled to deference if they are supported by
 25 substantial evidence and are "sufficiently specific to allow a reviewing court to conclude the
 26 adjudicator rejected the claimant's testimony on permissible grounds and did not 'arbitrarily
 27 discredit a claimant's [symptom] testimony.'" *Bunnell*, 947 F.2d at 345-346 (quoting *Elam*
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1 *v. Railroad Retirement Bd.*, 921 F.2d 1210, 1215 (11th Cir. 1991). When analyzing credibility,
 2 an ALJ may properly consider medical evidence in the analysis. *Rollins v. Massanari*, 261
 3 F.3d 853, 857 (9th Cir. 2001) (“While subjective pain testimony cannot be rejected on the sole
 4 ground that it is not fully corroborated by objective medical evidence, the medical evidence
 5 is still a relevant factor in determining the severity of the claimant’s pain and its disabling
 6 effects.”); *see also Batson v. Commissioner of Soc. Sec.*, 359 F.3d 1190, 1196 (9th Cir.
 7 2003)(holding ALJ properly determined credibility where claimant’s testimony was
 8 contradictory to and unsupported by objective medical evidence). “Factors that an ALJ may
 9 consider in weighing a claimant’s credibility include reputation for truthfulness,
 10 inconsistencies in testimony or between testimony and conduct, daily activities, and
 11 unexplained, or inadequately explained, failure to seek treatment or follow a prescribed
 12 course of treatment.” *Orn v. Astrue*, ____ F.3d ____ (9th Cir. 2007), 2007 WL 2034287, 9
 13 (official citation not available).

14 The ALJ determined Plaintiff suffers from medically determinable severe
 15 impairments; therefore, Plaintiff has satisfied the first prong of the *Cotton* test (Tr. 19). There
 16 is no evidence of malingering and the ALJ made no such finding. Accordingly, in order to
 17 reject Plaintiff’s testimony regarding the severity of his fatigue, the ALJ must offer specific,
 18 clear and convincing findings supported by the record.

19 Here, the ALJ concluded Plaintiff’s subjective complaints of pain, fatigue and
 20 limitations were not substantially credible because they were out of proportion to the overall
 21 weight of the objective medical evidence and “other factors of a non-medical nature” (Tr. 20).
 22 Plaintiff’s argument concerns the ALJ discrediting his fatigue testimony (Doc. #8 at 6-7).

23 The ALJ refused to credit and factor Plaintiff’s allegations of fatigue into his RFC
 24 analysis based on the lack of objective medical evidence. Specifically, the ALJ determined
 25 that, while Plaintiff has a history of left shoulder internal derangement with impingement and
 26 arthrosis, his condition improved significantly after two surgeries (Tr. 20). Furthermore, the
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1 ALJ found the medical records indicated Plaintiff's neck and back pain were stable on
 2 medications and Plaintiff was doing well and feeling better (*Id.*). In addition to referencing
 3 objective medical evidence documenting Plaintiff's improvement, the ALJ considered
 4 Plaintiff's scant history of medical care and lack of need for either back or neck surgery (Tr.
 5 21).

6 The only evidence regarding Plaintiff's alleged fatigue is his own testimony at the
 7 hearing that "on not so good days" (Tr. 284) when "sitting doesn't help and standing hurts"
 8 (Tr. 205) he lays down twice for an hour and a half to two hours and "[i]t kind of depends on
 9 if[he] slept that night" (*Id.*). The record indicates Plaintiff has a history of complaints of pain
 10 associated with his impairments; but, there is no evidence Plaintiff complained of fatigue to
 11 any physician or sought treatment for such fatigue. Accordingly, the ALJ's reasons for his
 12 credibility determination regarding Plaintiff's fatigue were specific, clear and convincing and
 13 supported by substantial evidence in the record.

14 **III. CONCLUSION**

15 After carefully reviewing the record as a whole, the district court should find there is
 16 substantial evidence to support the ALJ's determination.

17 **RECOMMENDATION**

18 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Reversal of the
 19 Commissioner's Decision (Doc. #8) be **DENIED**.

20 **IT IS FURTHER RECOMMENDED** that Defendant's Cross-Motion to Affirm the
 21 Commissioner's Final Decision (Doc. #9) be **GRANTED** and that the decision of the ALJ be
 22 **AFFIRMED**.

23 DATED: September 26, 2007.



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 25 **UNITED STATES MAGISTRATE JUDGE**
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